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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

PETER J. BRENNAN, SECRETARY OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETER J. BRENNAN, SECRETARY OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Western Union Telegraph Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the district court (Appendix A, *infra*, pp. 1a-8a) is not yet reported. The opinion of the Court of Appeals (Appendix C, *infra*, pp. 12a-27a) is reported at 46 U.S. L.W. 2132.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1977 (Appendix D, *infra*, pp. 28a-29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Fair Labor Standards Act requires that employers pay overtime pay to "bona fide executive, administrative, and professional employees," otherwise exempted from the overtime requirements of the Act by 29 U.S.C. § 213(a), when such employees perform the duties of strikers covered by those overtime requirements.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of §§ 7(a)(1) and 13(a) of the Fair Labor Standards Act, 29 U.S.C. §§ 207(a)(1) and 213(a), and of the regulations of the Secretary of Labor are set forth in Appendix E, *infra*, p. 30a-34a.

STATEMENT

Petitioner, Western Union Telegraph Company ("Western Union"), is a common carrier regulated by the Federal Communications Commission which provides telegraphic and related written communication services throughout the continental United States to the public, to industry, and to agencies of Federal, State and local governments. From June 1, 1971, through July 27, 1971, 14,715 employees represented by the United Telegraph Workers were on strike against Western Union. In addition, from June 1, 1971, through September 12, 1971, 2,947 employees within the New York metropolitan area represented by the Communication Workers of America were on strike. These two groups of employees constituted Western Union's entire rank and file work force performing operational, mechanical, clerical and maintenance work.

The strike forced Western Union to close 1,500 public message offices and to stop providing public message service. By assigning approximately 2,100 executive, administrative and professional personnel [1] to perform the duties of striking employees, however, Western Union was able to maintain certain other essential services to Federal and State governments. One of these services was the Automatic Digital Network ("AUTODIN") system provided to the Department of Defense. AUTODIN is capable of transmitting written messages at high speed, encoding and decoding them, and assigning priorities among them as to need for fast transmission, all with a high degree of accuracy and no breach of security. Among the other services maintained were the Air Weather Service, which transmits weather information for the Air Force and for the National Weather Service, and the National Crime Information System, which provides for transmission of information between the Federal Bureau of Investigation and State law enforcement agencies. Because of the need for technical skill and familiarity with system operations and, in the case of AUTODIN, the need for security clearances, Western Union could not have maintained these essential services during the strike without using executive, administrative, and professional employees.

The executive, administrative and professional employees who performed the duties of the strikers ordinarily qualify for exemption under 29 U.S.C. § 213(a) from the requirement of the Fair Labor Standards Act that employees be paid at the rate of one and one-half times their regular rate for hours worked in excess of forty per week. The executive, administrative, and professional employees who performed the duties of strikers were paid their usual salaries and were granted extra paid vacation but were not paid one and one-half times their regular rates.

The Secretary of Labor ("Secretary") brought this action under 29 U.S.C. § 217 to obtain an order enjoining Western Union from failing to pay one and one-half times

[1] These three categories of personnel are hereinafter sometimes referred to as "managerial employees."

their regular rates of pay to these executive, administrative and professional employees. The district court issued an order requiring Western Union to pay such overtime to administrative and professional employees, but not to executive employees.[2]

Western Union appealed the district court's order, and the Secretary cross-appealed the district court's failure to extend the order to executive employees. The Third Circuit affirmed the district court with respect to administrative and professional employees and reversed the district court with respect to executive employees.

REASONS FOR GRANTING THE WRIT

1. The decision of the Third Circuit in this case is in conflict with the decision of the Fourth Circuit in *McReynolds* v. *Pocahontas Corp.*, 192 F.2d 301 (1951), and the decision of the Court of Appeals of Kentucky in *Mafizola* v. *Hardy-Burlingham Mining Co.*, 306 Ky. 492, 207 S.W.2d 769 (1947).

In the present case, the Third Circuit held that "managerial personnel who perform strike duty are not necessarily exempt" from the overtime provisions of the Fair Labor Standards Act. Appendix C, *infra*, p. 24a. The *McReynolds* and *Mafizola* courts, on the other hand, held that managerial employees who perform strike duty do so "in an executive capacity" and remain exempt.

McReynolds concerned a foreman who performed manual labor during a strike, and *Mafizola* concerned a fore-

[2] The basis for the distinction drawn by the district court between administrative and professional employees on the one hand and executive employees on the other was a regulation issued by the Secretary concerning "Emergencies", which as interpreted by the Department of Labor allows executives to perform up to one week of nonexecutive work in certain emergencies without losing the executive exemption. In the Third Circuit, Western Union disclaimed reliance on this limited exception.

man who performed watchman's duties during a strike. The Fourth Circuit in *McReynolds* quoted the *Mafizola* opinion:

> Nor can we agree with plaintiff that the time he spent as a watchman during a strike was nonexempt work. While it is true that ordinarily a watchman's job is nonexempt work, yet when a strike is in progress and a foreman undertakes watchman's duties, he is performing such service in an executive capacity. In such circumstances, it is only an executive employee who is not a member of the union on strike who can be depended upon to perform such duties. 192 F.2d at 303.

The Third Circuit in the present case recognized the conflict: "To the extent that our conclusion differs from that of the court in *McReynolds* v. *Pocahontas Corp.*, 192 F.2d 301 (4th Cir. 1951), we must disagree with that decision." Appendix C, *infra*, p. 21a.

2. The Third Circuit has incorrectly construed the Fair Labor Standards Act. The decision of the Fourth Circuit is correct.

The legislative history of the Act demonstrates that the purpose of the Act was to raise the standard of living of workers unable to protect themselves through collective bargaining from low wages and long hours. The Report of the Senate Committee on Labor made clear that:

> It is only those low-wage and long-working hour industrial workers, who are helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.[3]

The House Committee on Labor was equally forthright in reporting that the purpose of the Act was "to raise the wages and shorten the working hours of the underprivi-

[3] S. Rep. No. 884, 75th Cong., 1st Sess. 3, 4 (1937).

leged of our country."[4] Repeatedly and consistently, the sponsors of the legislation reinforced this statement of purpose. Senator Walsh declared, for example, that:

> The purpose and content of this bill is that the poorest, the lowest, the humblest wage earner in this country shall not be left helpless because he has not the facilities of a labor organization to help him enjoy social justice.[5]

The principal provisions of the Act—establishment of a minimum wage and limitation of the number of hours per week an employee could be required to work without being paid time and one-half his regular rate—were carefully tailored to fit the Congressional purpose. The minimum wage was designed to increase the worker's income to an acceptable level. The requirement to pay time-and-one-half for overtime was designed to prevent sweatshop conditions by giving employers a strong incentive to hire additional workers and by insuring that rank and file employees who were forced to work long hours were properly compensated.

Congress exempted "bona fide executive, administrative, and professional" employees from the maximum hours and overtime pay provisions of the Act in recognition that such employees receive substantial salaries, are part of management, and are fully able to protect themselves.

A managerial employee does not become a rank and file employee in need of the special protection of the Act merely because he or she is temporarily performing the duties of a striking worker.[6] Indeed, as the Fourth Circuit

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[4] H.R. Rep. No. 2182, 75th Cong., 3d Sess. 5 (1938).

[5] 81 Cong. Rec. 7801 (1937). *See also* 83 Cong. Rec. 7279, 7281, 7282, 7283-85, 7290, 7291, 7298 (1938).

[6] The Third Circuit's view, that this interpretation of Congressional intent proves too much because it would also exempt highly paid rank and file employees, is erroneous. Congress made a broad judgment that for the reasons sketched above, only bona fide managerial employees—not all highly paid employees—should be exempt from the overtime provisions of the Act.

recognized in *McReynolds*, performing strike duty is one of the responsibilities of a managerial employee. 192 F.2d at 303. While serving as striker replacements, managerial employees continue to be paid salaries determined by the value to the company not solely of their performance of strike duty but of the whole range of their managerial responsibilities. Moreover, the other terms of their employment remain unaffected. Many continue to devote substantial portions of their time to their ordinary managerial responsibilities. When the strike is over, they return full time to those responsibilities, which frequently involve work far in excess of forty hours per week.

The contrary position, urged by the Secretary and adopted by the Third Circuit, elevates form over substance by treating indisputably managerial employees performing a managerial function as if their bona fides as managers were questionable. The regulations upon which the Secretary and Third Circuit rely establish for each category of exempt employee—executive, administrative, and professional—alternative tests for determining whether employees fall within that category.[7] Under one test, the so-called "long test," the employee must perform appropriate duties, receive a high salary, and spend no more than 20% of his time each week performing non-exempt work. Under the other test, the so-called "short test," the employee must earn an even higher salary and must have managerial responsibilities as his primary duty.

When applied to screen out rank and file employees who are masked with managerial titles, the regulations adequately serve to insure that the employees are "bona fide executive, administrative and professional" employees

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[7] The regulations establishing these tests, 29 C.F.R. §§ 541.1, 541.2, and 541.3, are set forth in Appendix E, *infra*, pp. 30a-34a.

within the meaning of the Act. When applied to transform bona fide managers temporarily performing strike duty into rank and file employees, the regulations have no basis in the text of the Act or its purposes as reflected in the legislative history.[8]

While courts must accord deference to an agency's interpretation of a statute which it administers, "[t]he deference owed . . . cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Bldg. Co.* v. *N.L.R.B.*, 380 U.S. 315, 318 (1965). The Secretary's function in regard to the section 13(a) exemption is to provide further delineation of those who are bona fide managerial employees. It is not to exclude or fail to include those whose bona fides is incontestable. In this case it is clear that the reason the employees in question were working during the strike was that they were managers.

3. The ability to use managerial employees to maintain essential operations during a strike is one of the "economic weapons" preserved for management by the National Labor Relations Act. Whether the overtime provisions of the Fair Labor Standards Act should be interpreted to disarm this weapon is an important question concerning the intersection of two Federal statutes which should be settled by this Court.

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[8] Three reports reviewing the Act's exemptions prepared for the Department of Labor after extensive public hearings are silent on the subject of managerial employees performing strike duty. This silence confirms that the policy considerations and practices which have shaped the current regulations are wholly inapposite here. *See* H. Stein, Report to the Administrator, Wage and Hour and Public Contracts Division (1940); H. Weiss, Report to the Administrator, Wage and Hour and Public Contracts Division (1949); H. Kantor, Report and Recommendations on Proposed Revision of Regulations, Part 541, under the Fair Labor Standards Act Defining the Terms "Executive," "Administrative," "Professional," "Local Retailing Capacity," "Outside Salesman" (1958).

Congress has established a labor management relations policy which relies upon good faith bargaining between the parties but allows labor and management an arsenal of economic weapons for use in influencing the bargaining process. In *N.L.R.B.* v. *Insurance Agents Int'l*, 361 U.S. 477 (1960), this Court observed:

> The presence of economic weapons in reserve, and their actual use on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. 361 U.S. at 489.

This Court has carried out the intent of Congress by rebuffing restrictions on the good faith use of these weapons, whether sought to be imposed by the National Labor Relations Board, *e.g.*, *American Ship Bldg. Co.* v. *N.L.R.B.*, *supra*, (lockout); *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (lockout and use of permanent replacements); *N.L.R.B.* v. *Insurance Agents Int'l*, *supra* ("quickie strikes"); or by state law, *e.g.*, *Machinists* v. *Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976) (refusal by union members to work overtime); *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964) (secondary picketing); *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953) (recognitional picketing).[9]

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[9] This is not a case involving the validity of a general purpose welfare program funded by a state, *compare ITT Lamp Division* v. *Minter*, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971) and progeny, but rather a direct interference under color of one Federal labor statute with prerogatives permitted to management under another Federal labor statute.

State laws providing unemployment compensation interfere more seriously with collective bargaining than do State welfare laws and have been struck down or sustained depending upon the specific provisions of the State law in question. *Compare Kimbell* v. *Employment Security Comm'n* No. 10323 (N.M. Dec. 29, 1975), appeal dismissed, 429 U.S. 804 (1976) (unemployment compensation to strikers who fail substantially to curtail employer's operations upheld) *with New York Telephone Co.* v. *New York State Dep't of Labor*, 45 U.S.L.W. 2579 (S.D.N.Y. 1977) (unemployment compensation to strikers without regard to effect on employer struck down).

A union's use of its most potent economic weapon, the strike, has serious effects on a company. In the present case, Western Union's net operating income fell from a profit of more than $3,000,000 the month before the strike to a loss of more than $2,000,000 in the first month of the strike. According to the Bureau of Labor Statistics, there were 5,138 work stoppages nationwide in 1971, the year of the strike which gave rise to the present case,[10] and 77.9% of the days of work lost because of strikes resulted from protracted strikes lasting thirty days or longer.[11]

In response to these strikes, management has at its disposal a number of economic weapons, notably including the use of managerial personnel to maintain operations.[12] In *N.L.R.B.* v. *Brown*, 380 U.S. 278 (1965), a number of retail food stores, one of which was faced with a strike, locked out the remaining members of the striking union and maintained operations with temporary replacements:

> The stores . . . continued to carry on business by using management personnel, relatives of such personnel, and a few temporary employees. 380 U.S. at 281.

The Court upheld the good faith use of these economic weapons by management. *See also Ottawa Silica Co.*, 197 N.L.R.B. 449, 456 (1972), *enf'd* 482 F.2d 945 (6th Cir. 1973) (use of supervisory employees to maintain silica plant operations during a lockout); *Ozark Steel Fabricators*, 199 N.L.R.B. 847 (1972) (use of management personnel to continue fabrication of structural steel).

In the present case, Western Union was able to minimize its losses by assigning managerial personnel to strike

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[10] U.S. Dep't of Labor, Handbook of Labor Statistics 1976, 298.

[11] *Id.* at 300.

[12] *See, e.g.*, J. Robinson & R. Walker, Labor Economics and Labor Relations 369 (1973); J. Hutchinson, Management Under Strike Conditions 124-25 (1966).

duty. This long-standard management practice has been effective in, for example, the oil,[13] chemical,[14] entertainment,[15] and communications[16] industries.

The decision whether to pay overtime or provide some other reward to some or all managerial employees on strike duty is properly and has heretofore been a management decision affected by a range of factors including what the company can afford under strike conditions.[17] Because managerial salaries can be very high and because managers may need to work extremely long hours to maintain operations during a strike, the cost of paying for overtime work at the rate of time and one-half may seriously affect a company's ability to withstand a strike. The position adopted by the Third Circuit would seriously burden, and in many cases effectively destroy, one of management's most potent economic weapons by substantially increasing its cost at a time when the company is economically vulnerable because of a strike.

So significant a change in the law governing the relationship between labor and management should not be made without full review by this Court.

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[13] *Strikes: What Softened the Punch*, Chemical Week, Oct. 5, 1963, at 41-43.

[14] *Id.*

[15] *At CBS the Show Goes On*, Business Week, Apr. 12, 1958, at 132-33.

[16] *Wires Keep Humming in Phone Walkout*, Business Week, April 27, 1968, at 102-03.

[17] L. Tagliaferri, *Plant Operation During A Strike*, Personnel Ad., March 1972, at 51.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action File No. 771-73

JOHN J. DUNLOP, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR
Plaintiff,

v.

WESTERN UNION TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION

Newark, New Jersey

January 28, 1976

LACEY, District Judge.

The plaintiff has invoked this court's jurisdiction under Sec. 17 of the Fair Labor Standards Act of 1938 (The Act), 29 U.S.C. Sections 201, *et seq.*, in his suit to enjoin defendant's alleged violations of the Act's overtime and recordkeeping provisions and to restrain the withholding of unpaid compensation allegedly due some of defendant's managerial employees. The alleged violations occurred during a strike in 1971 when defendant's executive, administrative and professional employees, normally exempt by virtue of 29 U.S.C. Sec. 213(a)(1) from the overtime provisions of the Act, performed nonexempt work under circumstances which will hereinafter be delineated.

THE PARTIES' POSITIONS

The parties have stipulated many of the critical facts. Whether the stipulation is comprehensive enough, however, is a question I shall later address. From the stipulation, the following can be gleaned.

The Secretary of Labor (Secretary) instituted this action to compel the Western Union Telegraph Company (Western Union) to compensate pursuant to the Act's requirements its statutorily exempt "executive, administrative and professional employees" [29 U.S.C. 213 (a)] for overtime work performed by these otherwise exempt employees when they served as replacements for striking employees during a labor dispute. That the defendant employer is subject to the Act's requirements is not disputed. The only issue is whether those employees, hereinabove defined, lost their Sec. 213(a) exemption when they performed nonexempt work during a prolonged strike of employees who normally performed such work.

The Act, as noted, does not require that an employer adhere to its overtime provisions where such work is performed by "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delineated from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act) . . ." 29 U.S.C. Sec. 213(a).

The Secretary has in fact by legislation regulation defined "executive," "administrative," and "professional employees," 29 C.F.R. Section 541.1.3.

These exempt employees are referred to in the parties' stipulation as "managerial employees" and it is further stipulated that the "only manner in which Western Union was able to provide . . . services during the strike was by assigning managerial employees to perform" the non-

exempt work "as replacements for the striking employees who normally performed such tasks." Stip. para. 6. The stipulation also details the essential nature of the services thus performed. Stip. paras. 5-8.

Obviously, the legislative regulations referred to, recognize and deal with situations that may arise where one who is designated as one of the exempt employees, for example, an executive, may have to perform tasks not regularly his which are ordinarily performed by nonexempt employees. *Cf.* 29 C.F.R. Sec. 541.1(a), which refers to "primary" duties, and (e) which refers to a percentage tolerance, 20%, allowed for nonexempt work by an "executive."

The Secretary has also promulgated Interpretive Regulations, 29 C.F.R. Sections 541.99, *et seq.* Thus, Sections 541.101 - .119 deal with the "executive;" of initial interest to us is Sec. 541.109 dealing with "Emergencies" which in pertinent part provides:

"Under certain occasional emergency conditions, work which is normally performed by nonexempt employees and is nonexempt in nature will be directly and closely related to the performance of the exempt functions of management and supervision and will therefore be exempt work. In effect, this means that a bona fide executive who performs work of a normally nonexempt nature on rare occasions because of the existence of a real emergency will not, because of the performance of such emergency work lose the exemption. Bona fide executives include among their responsibilities . . . the prevention of widespread breakdown in production, sales, or service operation. Consequently, when conditions beyond control arise which threaten . . . a cessation of operations . . . any manual or other normally nonexempt work performed in an effort to present such results in considered exempt work and is not included in computing the percentage limitation on nonexempt work."

There is no specific interpretation bearing upon the issue presented us. The Secretary, however, does not stop with the Interpretative Regulations. He relies instead upon the opinion of Deputy Wage Hour Administrator Ben P. Robertson, dated June 7, 1968, that a strike "emergency" can exist "only in the week during which the strike began" and that, therefore, time and one-half payment must be made to executives for nonexempt work performed in all but that first week of a strike.

Thus the Robertson opinion letter reads in pertinent part as follows:

> The policy that the WHPC Divisions follow in regard to emergencies is set out in Section 541.109 (WHM 92:631) . . .
>
> * * * *
>
> This policy is followed in emergencies which threaten the safety of employees, preservation and protection of property, or to prevent a widespread breakdown in operations, and only for those exempt executives in charge of the department or subdivision which is threatened by the emergency.
>
> In some instances, as in the case of a strike where the continued operation and maintenance of services essential to a community are involved, the WHPC Divisions have considered an emergency to exist within the meaning of Sec. 541.109 (WHM 92:631), but only in the week during which the strike began, and only with respect to executive employees. (WHM 92:646).

It is true that interpretative bulletins and opinion letters of the Wage and Hour Administrator constitute a "body of experience and informed judgment," Skidmore v. Swift, 323 U.S. 134, 140 (1944), and are entitled to "great weight" by the courts. *United States* v. *American Trading Associations*, 310 U.S. 534, 539 (1940), *Brennan* v. *State of New Jersey*, 364 F. Supp. 156, 158 (D. N.J. 1973). *See also, Lucas Coal Co.* v. *Interior Board of Mine Operations Appeals*, 522 F.2d 581, 584 (3d Cir. 1975).

> The ruling that Sec. 77.410 includes bulldozers in its coverage constitutes an interpretation of an administrative regulation that may not be set aside unless it is plainly erroneous or inconsistent with the regulations.[12] Courts are obliged to accord great deference to an administrative agency's construction of the language of the statute which it administers and, even more clearly, the agency's interpretation of regulations it has drafted.[13] An agency's explication of its regulation if reasonable, therefore, is controlling despite the existence of other interpretations which may seem even more reasonable.[14]

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[12] Udall v. Tallman, 380 U.S. 1, 16 (1965).

[13] *Id.* at 16; Budd Co. v. Occupational Safety and Health Review Comm'n, 513 F.2d 201, 204 (3d Cir. 1975).

[14] Budd Co. v. Occupational Safety and Health Review Comm'n, 513 F.2d 201, 205 (3rd Cir. 1975).

This Court's view is that the Robertson opinion, applied across the board, does violence to the legislative purpose when applied to the facts of this case.

The starting point of my analysis is that the Administrator concedes a strike resulting from a labor dispute can qualify as an "emergency" under Interpretative Regulation Sec. 541.109, and that the Secretary here concedes that the 1971 strike involved in this case qualified as one which resulted in "conditions beyond control . . . which threaten . . . a cessation of operations. . . ." Thus the Secretary will consider the replacement work performed by defendant's executives "exempt" work *but only for one week*. It is this temporal limitation for which I see no basis, given the stipulated facts of this case and this strike.

In the first place, the "one week" limitation overlooks the plain fact that the executives involved stepped into

the breach, to use the words of Sec. 541.109, in fulfillment of "responsibilities . . . (to prevent) widespread breakdown in production, sales, or service operations." This was "directly and closely related to the performance of the exempt functions of management and supervision. . . ." On what basis, then, can a one-week time limit be imposed? A possible rationale is that it is felt that in a week management can hire others from outside to perform the nonexempt work; or, if this proves unfeasible, can capitulate to the union thus ending the strike, or close the plant down. The latter two possibilities cannot be accepted as supportive of the one-week limitation. To countenance such an underlying philosophy is to permit the Secretary to tilt the balance in the collective bargaining process. *Cf. Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974). What is left then is the first possibility: That *any* strike-caused emergency will not be allowed to last more than one week for "exempt" treatment purposes under Sec. 541.109.

This "across-the-board" treatment of each and every strike at each and every company, no matter what its business, applying in effect a conclusive presumption that after one week the "emergency" of the regulation is at an end, since management now has had an opportunity to right itself by hiring new personnel, hardly accords here with Due Process requirements.

Not only did the defendant have the usual problems any company would face in hiring personnel as replacements for strikers. Here, as the stipulation plainly demonstrates, the replacements not only had to be highly trained technicians in many instances. They also had to be investigated and given security clearance. To suppose this could be done in one week is to indulge in fantasy.

I hold then that the one-week provision is unreasonable and cannot be enforced. Instead, the Secretary must make an analysis of all the facts in order to determine how long

the "emergency", as contemplated by Sec. 541.109, continued. He cannot avoid that duty by relying upon the Robertson opinion and saying "one week."

Defendant and the Chamber of Commerce of the United States (The Chamber), in its amicus brief, make a strong argument that the interpretative regulation itself (i.e., Sec. 541.109) must be declared void. Their argument is that *management* has the duty of preventing breakdown in services and equipment, and property damage, as recognized by the Secretary in Sec. 541.109, and that it is unreasonable to limit "management" to "executives." Rather, they argue, the other two exempt categories of employees, administrative and professional, should also be covered by the "emergency" provisions of the regulations.

The argument is not without force. Thus the defendant assigned executive, administrative and professional employees to perform the operational tasks of the striking employees. It was impossible to obtain temporary replacements for the strikers from outside sources because of both the national security clearances required for AUTODIN and the technical skills required to maintain substantially all systems. The only source for personnel with both requisite qualifications was the managerial ranks of the company. (Stip. para. 6.)

Congress certainly did not distinguish between the classes of exempt employees in creating the exemption in Sec. 13(a)(1) of the Act. It exempted all three classes, in the same sentence, without qualifying the exception of any one class; and of course the Secretary's regulations, legislative and interpretative, in defining each class of exempt employees, do not suggest any basis for drawing a distinction between them in their performance as replacements for strikers. Indeed, the definitions of the regulations describe executives and administrative employees as engaged directly in management functions, and profes-

sional employees as performing services intimately related to the management function.

When any of these three classes steps in, during a strike, to perform some menial job, he is doing so as a management function to keep the plant going. He is acting as management, not as a janitor or laborer or machinist, responding to the strike.

Given the national labor policy in favor of collective bargaining, and the correlative policy of not tilting the balance between labor and management, how is it justified that only "executives" who serve as striker replacements retain *some* exemption, while administrative and professional employers do not?

Were I writing on a clean slate, and not sitting in review of an administrative agency's rule-making function, *see, Skidmore* v. *Swift, supra*, I would be inclined to treat defendant's view as persuasive. Under the circumstances, however, I cannot say that the Secretary's rule is "plainly erroneous," *Lucas Coal Co.* v. *Interior Board of Mine Operations Appeals, supra*, and therefore I must uphold the regulation's distinguishing between "executives" on the one hand and "administrative" and "professional" employees on the other.

Submit an order consistent with the foregoing.

Dated: January 28, 1976

/s/ Frederick B. Lacey,
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action File No. 771-73

W. J. USERY, JR., SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

WESTERN UNION TELEGRAPH COMPANY,
Defendant.

JUDGMENT

Plaintiff having moved for Partial Summary Judgment and Defendant for Summary Judgment and the Court having considered the Stipulation of Facts together with the Exhibits submitted by the parties, the affidavits in support of these motions, all the papers on file in the office of the Clerk of this Court, the memoranda in support of their motions submitted on behalf of plaintiff and defendant and on behalf of the Chamber of Commerce of the United States of America as Amicus Curiae and the Court having filed its Memorandum Opinion on January 29, 1976, it is now:

ORDERED, ADJUDGED AND DECREED that Defendant Western Union Telegraph Company, its officers, agents, servants, employees, and those persons in active concert or participation with them who received actual notice of this order by actual service or otherwise be and they hereby are enjoined and restrained from violating

the provisions of sections 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201-219), hereinafter called the Act. This prohibition does not include employees classified as "Executive" employees within the meaning of the Act and Regulations, for the reasons stated in the Court's Memorandum Opinion.

ORERED, ADJUDGED AND DECREED that

(a) Defendant and Plaintiff shall proceed promptly to stipulate to the amounts owed to Defendant's "Administrative" and "Professional" employees who served as replacements for the striking employees during the period from June 1, 1971 through September 12, 1971 which have been withheld from them in violation of section 7(a) of the Act, with interest at six per cent per annum from the dates the amounts were earned.

(b) If a stipulation conforming to (a) above has not been executed on or before June 30, 1976, either party may apply to the Court for an Order directing the manner in which the foregoing amounts are to be determined under the Court's supervision.

(c) No later than 30 days after the aforesaid stipulation or other determination of amounts so withheld by Defendant shall have been filed, all such amounts, less deductions required by law, shall be remitted by Defendant to Plaintiff, and Plaintiff shall distribute to the persons named in the supplemental order or to their surviving heir or heirs if that is necessary, all such amounts, and any money not so distributed by the Plaintiff within three years because of Plaintiff's inability to locate the proper person, or because of such person's refusal to accept such money, such money shall be deposited with the Clerk of the District Court who shall forthwith de-

posit such money with the Treasury of the United States pursuant to 28 U.S.C. Section 2041.

Dated this 24 day of May, 1976.

/s/ Frederick B. Lacey,
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2014/15

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Appellant in 76-2014

v.

WESTERN UNION TELEGRAPH CO.,
Appellant in 76-2015

(D.C.Civil No. 771-73)

On Appeal From the United States District Court for
District of New Jersey

Argued March 31, 1977

Before SEITZ, *Chief Judge*, ALDISERT and HUNTER, *Circuit Judges.*

OPINION OF THE COURT

(Filed Aug. 12, 1977)

SEITZ, *Chief Judge*

This case raises the question of whether employees normally exempt from the maximum hours provisions of the Fair Labor Standards Act because they function in executive, administrative or professional capacities are subject to these provisions during a strike period in which they take over the functions normally performed by rank and file employees. The district court held that the executive

employees are exempt, but concluded that the administrative and professional employees who work more than 40 hours per week must be paid one and one-half times their regular rates of pay. The defendant, Western Union Telegraph Company, appeals the provision of the district court's judgment which directs it to pay overtime to the administrative and professional employees. The Secretary of Labor, who is the plaintiff, cross-appeals the court's conclusion that the executive employees are subject to exemption from the maximum hours provisions of the FLSA.

The case arises on a stipulated set of facts, the relevant provisions of which are as follows. Western Union, the only domestic telegraph company serving the continental United States, engages in the business of providing telegraphic and related written communications services to the general public, private industry, and various agencies of federal, state, and local governments. From June 1, 1971 through July 27, 1971, 14,715 of the company's employees represented by the United Telegraph Workers were on strike against the company. From June 1, 1971 through September 12, 1971, 2,947 employees represented by the Communication Workers of America also went out on strike. These two groups of "striking employees constituted the entire rank and file work force of Western Union personnel engaged in operational, technical and clerical functions and in the maintenance of systems and equipment."

Western Union, however, continued to provide some of its communications services during the strike—chiefly those "which were essential to the domestic defense communication services and to national defense." The Stipulation states that "[t]he only manner in which Western Union was able to provide the foregoing services during the strike was by assigning [approximately 2,100] managerial employees to perform the clerical, technical, opera-

tional, and maintenance functions necessary thereto, as replacements for the striking employees who normally performed such tasks," and that Western Union could not have provided the services in question by obtaining replacements for the striking employees from other sources because of "the technical skill and familiarity with the operations required," and in the case of one service provided to the Department of Defense, because "of the requirement for high level national security clearance." The parties have also stipulated that "[a] substantial number [of the managerial employees on strike duty], but not all, devoted more than 50% of their time during the period of the strike to the clerical technical, maintenance and operational tasks normally performed by the striking employees."

I.

The "judgment" appealed from states that the district court has:

> ORDERED, ADJUDGED AND DECREED that Defendant Western Union Telegraph Company, its officers, agents, servants, employees and those persons in active concert or participation with them who received actual notice of this order by actual service or otherwise be and they hereby are enjoined and restrained from violating the provisions of sections 15 (a) (2)[1] of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201-219), hereinafter called the Act.
>
> This prohibition does not include employees classified as "executive" employees within the meaning of the Act and Regulations, for the reasons stated in the Court's Memorandum Opinion.

[1] Section 15(a)(2) of the FLSA, forbids, inter alia, the violation of the maximum hours provisions of the Act.

The Court also ordered that:

> (a) Defendant and Plaintiff shall proceed promptly to stipulate to the amounts owed to defendant's "Administrative" and "Professional" employees who served as replacements for the striking employees during the period from June 1, 1971 through September 12, 1971 which have been withheld from them in violation of section 7(a)[2] of the Act, with interest at six percent per annum from the dates the amounts were earned.
>
> (b) If a stipulation conforming to (a) above has not been executed on or before June 30, 1976, either party may apply to the Court for an order directing the manner in which the foregoing amounts are to be determined under the Court's supervision.
>
> (c) No later than 30 days after the aforesaid stipulation or other determination of amounts so withheld by Defendant shall have been filed, all such amounts, less deductions required by law, shall be remitted by Defendant to Plaintiff, and Plaintiff shall distribute to the persons named in the supplemental order or to their surviving heir or heirs if that is necessary, all such amounts, and any money not so distributed by the Plaintiff within three years because of Plaintiff's inability to locate the proper person, or because of such person's refusal to accept such money, such money shall be deposited with the Clerk of the District Court who shall forthwith deposit such money with the Treasury of the United States pursuant to 28 U.S.C. Section 2041.

The parties assert that this appeal lies under § 1291 because the above order constitutes a final judgment. We conclude, however, that the appeal shall be entertained under § 1292(a)(1), since we read the above order to enjoin future violations of the FLSA, as well as setting

[2] Section 7(a) of the FLSA contains the basic requirement that an employer pay time and one-half for overtime.

the framework for the payment of the amounts which Western Union failed to give administrative and professional employees who performed overtime strike duty in 1971. We have serious doubts as to whether we would have jurisdiction of this case if the order had merely restrained Western Union from withholding overtime compensation due for the period of the 1971 strike. First, the provisions of the district court's order which concern the 1971 strike leave open important questions pertaining to the calculation of the amount of overtime which the company must pay—as we shall discuss further below. The order thus cannot be deemed to constitute a final judgment for purposes of § 1291. *See* 9 Moore's Federal Practice Para. 110.08[8]. Moreover, even though 29 U.S.C. § 217,[3] the statute giving the district court jurisdiction of this case, appears to refer to an order against "withholding of . . . overtime compensation found by the court to be due to employees" as an injunction, we question whether an order to pay money due for past transactions amounts to an injunction for purposes of appeal under § 1292(a)(1). *See United Bonding Insurance Co.* v. *Stein*, 410 F.2d 483 (3d Cir. 1969).

In any event, we need not decide whether we would have jurisdiction of the case if the district court's order had merely restrained Western Union from withholding overtime compensation due for the period of the 1971 strike. We say this in view of the fact that we must consider the

[3] Injunction proceedings.

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15 of the Act, including in the case of violations of section 15(a)(2) of the Act the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title.

same issues as to the order's prospective effect as we would face with respect to the 1971 strike, and the fact that our conclusions on these issues will be binding on the district court in the future proceedings contemplated in the court's order as to the calculation of the amounts due for the period of the 1971 strike. However, the fact that the district court's order does not precisely specify Western Union's obligations under the maximum hours provisions of the FLSA—either with respect to the 1971 strike or the future—does affect the scope of the issues we may consider on this appeal. We may infer from the district court's order only that: 1) administrative and professional employees who perform strike duty are not exempt from the FLSA solely because of their usual status as administrators and professionals 2) executive employees are subject to exemption when performing strike duty, at least in certain circumstances. It is the propriety of these decisions which we shall consider.

II.

The initial question before us is whether managerial [4] employees who perform strike duty remain exempt from the maximum hours provisions of the FLSA because they continued to be "employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act . . .)."

Western Union first contends that there is no sufficient statutory basis for obligatory payment of overtime to managerial employees who perform strike duty. Some aspects of the legislative history tend to support this

[4] We shall use the term "managerial" employees to mean employees who, apart from the strike context, usually qualify for exemption from the maximum hours provisions because they function "in a bona fide executive, administrative, or professional capacity."

argument. In his May 24, 1937, letter urging Congress to consider the FLSA, President Roosevelt said:

> The overwhelming majority of our population earns its daily bread either in agriculture or in industry. One-third of our population, the overwhelming majority of which is in agriculture or industry, is ill-nourished, ill-clad, and ill-housed . . . Our Nation, so richly endowed with natural resources and with a capable and industrious population, should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours . . . As we move resolutely to extend the frontiers of social progress, we must be guided by practical reason and not by barren formula. We must ever bear in mind that our objective is to improve and not to impair the standard of living of those who are not undernourished, poorly clad, and ill-housed.[5]

The FLSA itself contains the finding that:

> the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes

[5] 81 Cong. Rec. 4983-4.

> with the orderly and fair marketing of goods in commerce.[6]

Moreover, in United States v. Darby, 312 U.S. 100, 109-110, the Supreme Court said that the "purpose" of the FLSA:

> . . . is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard conditions among the workers of the several states.

Thus, some aspects of the legislative history tend to support the contention that the maximum hours provisions were intended to cover the rank and file working man, and not managerial personnel who, for a few months, and at their regular salaries, perform strike duty, with every expectation of returning to their regular duties as soon as the strike is over.

But the argument that Congress could not have intended the employees in question to be subject to the FLSA cuts too far. It is clear that the maximum hours provisions would apply to a skilled tradesman earning substantial sums of money each week—hardly the sort of "ill-nourished, ill-clad, and ill-housed" individual that one might think Congress envisioned. If one looks *solely* to the weeks in which Western Union's managerial personnel perform extensive strike duty, one must consider them indistinguishable from highly paid working men.[7] On the

[6] 29 U.S.C. § 202(a).

[7] We agree with the Secretary's contention that the Act does not require a jurisprudence of labels. Thus, the fact that salaries are labelled "managerial" has no necessary consequence.

other hand, if the FLSA mandates that one look to a broader time frame than the weeks in which the managerial personnel perform strike duty, it is possible that these employees should be considered exempt—either on the theory that it is a managerial function to perform strike duty, or on the theory that managerial personnel basically function in a managerial capacity over the long haul, despite any given strike interlude. In sum, any contention that managerial employees should be exempt from the maximum hours provisions must focus on the question of what time period one must look to in determining whether the exemption applies.

The Secretary of Labor argues that the FLSA does not require that one look to what managerial employees do before and after a strike, and that, in fact, each work week may be viewed separately under the Act. Two factors lead us to conclude that this is an acceptable position. First 29 U.S.C. § 207(a)(1) says that:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in *any* workweek is engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. (emphasis added).

Thus, the statute speaks of *any* workweek. Moreover, exemptions from the coverage of the FLSA are to be narrowly construed. *See Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 391-2 (1960).

Second, we must adhere to the rule that an agency's interpretation of its governing statute is to be accorded deference. *See Batterton* v. *Francis*, 45 L. W. 4768, 4770 (U.S., June 20, 1977). As the Supreme Court stated in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 577-8.

> . . . the purpose of the Act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the Act even though their hourly wages exceeded the statutory minimum. The provision of [§ 207(a)] requiring this extra pay for overtime is clear and unambiguous. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and *workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act.* (emphasis added.)

We believe that the Secretary to be within the scope of his discretion in concluding that the policy of compensating workers for a burdensome workweek applies with respect to each distinct workweek.[8]

Western Union contends that extending the coverage of the maximum hours provisions of the FLSA to managerial employees on strike duty would bring the Act into conflict with the dominant federal law of labor relations, because it would constitute an artificial alteration of the balance of economic power in the collective bargaining process.[9] The parties have cited us to cases involving the validity of state laws authorizing the payment of unemployment compensation benefits to strikers. In *Super Tire Engineering Co.* v. *McCorkle*, 550 F.2d 903 (3d Cir. 1977), we concluded on the basis of the Supreme Court's dismissal for want of a substantial federal question in *Kimbell, Inc.* v. *Employment Security Commission*, 429 U.S. 804 (1976),

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[8] To the extent that our conclusion differs from that of the court in *McReynolds* v. *Pocahontas Corp.*, 192 F.2d 301 (4th Cir. 1951), we must disagree with that decision.

[9] *See H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

that payment of unemployment compensation to strikers does not constitute an impermissible interference with interference with federal labor policy. The alleged interference with federal labor policy as declared in the National Labor Relations Act is even less compelling in the present case. First, Western Union's argument raises the issue of how two federal statutes—the FLSA and the NLRA—are to be reconciled, rather than a question of whether state law has been preempted. Second, in contrast with the payment of unemployment compensation, the benefits of the maximum hours provisions of the FLSA accrue to individuals who have sustained the burden of a long workweek rather than to the strikers themselves. In short, this is not a subsidy to individuals who are in need of assistance by virtue of the very fact that they are out on strike, but a measure taken, in part, to redress the burden of long working hours. We would require stronger evidence of Congressional intent before we concluded that the policies of the FLSA may not be put into effect because, in cases where an employer cannot readily find replacements for its striking rank and file employees, these policies happen to have an effect on the economic weapons the employers may bring to bear against its striking employees.

Western Union has also argued that even assuming the "bona fide executive, administrative, or professional capacity" exemption could be applied to managerial employees on strike duty, the Secretary has failed to so define it. We note at the outset that Western Union must show that the Secretary's regulations as to this exemption *do* exempt managerial employees who perform strike duty. If the company fails to make such a showing, it will be subject to the Act's broad requirement that an employer pay overtime to "any employee who performs over forty hours of work per workweek.

While the Secretary's regulations as to executive, administrative, and professional employees differ in some

respects, their basic structure is similar. The statutory phrase "employee employed in a bona fide executive . . . capacity" has been defined to mean any employee:

> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent . . . of his hours in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section . . .
>
> (f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week . . . exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section. 29 C.F.R. § 541.1.

We must agree with the Secretary's argument that this regulation is not to be read to universally exclude all man-

agerial personnel who perform strike duty. As we said in Lucas Coal Co. v. Interior Board of Mine Operations Appeals, 522 F.2d at 584: "[a]n agency's explication of its regulation if reasonable . . . is controlling despite the existence of other interpretations that may seem even more reasonable." We note, however, that we hold no more than that managerial personnel who perform strike duty are not necessarily exempt. As we have observed, the "judgment" entered by the district court leaves open important questions involving the application of the regulations. For example, the district court has not yet specifically decided if, under the regulations, the determination of whether an employee is "employed in a bona fide executive . . . capacity" is to be made with respect to each week separately or with respect to broader period of time. Since questions involving such detailed application of the regulations are not within the purview of the court's order enjoining Western Union from future violations of the maximum hours provisions of the FLSA, we do not consider them.[10]

III

Apart from the exemption for employees "employed in a bona fide executive, administrative, or professional capacity," which finds explicit basis in the Act, the Secretary has also promulgated regulations which exempt work done by bona fide executives under "certain occasional

[10] Amicus curiae has argued that even if the determination of whether employees earning $155 per week are exempt is to be made with respect to each separate workweek, this is not true with respect to those earning $250 per week or more, since the chief applicable test is that the employee's "primary duty" is to perform managerial duties, and "primary function" is to be measured over a period of time broader than each workweek. We emphasize that we have held merely that with a strike of some length, managerial personnel will lose their exemption. We need not, given the generality of the district court's order, and do not discuss questions involving the detailed application of the regulations.

emergency conditions," including "conditions beyond control . . . which threaten . . . a cessation of operations." 29 C.F.R. § 541.109. The district court concluded that Western Union's *executive* employees who performed strike duty are subject to exemption under this regulation, and the Secretary has cross-appealed the district court's decision. We need not discuss the merits of this issue, however, since Western Union, in response to a specific written inquiry propounded by the Court after oral argument of this case, disclaimed reliance on the "Emergencies" regulations—arguing, in fact, that it does *not* apply, despite the fact that the company apparently relied on this regulation below. We express no view as to the relevance of the regulation, but conclude simply that we shall not give Western Union the benefit of an exemption which it explicitly repudiates. We say this despite the fact that the Secretary has conceded that, for a period of up to one week after the strike began, the strike "created an 'emergency' within our guidelines." It is for the company, not the Secretary, to invoke the benefits which any exemption in the statute or regulations may offer.

In sum, Western Union's executive employees are not to be treated differently from its administrative and professional employees because of the "Emergencies" regulation. Nor is there any reason to treat them differently for purposes of the "bona fide executive, administrative, or professional capacity" exemption—at least until such time as the district court has considered the detailed application of the regulations dealing with this exemption.

The judgment of the district court will be reversed as to the Secretary's cross-appeal. The judgment will be affirmed on Western Union's appeal. Costs are taxed against Western Union Telegraph Co.

HUNTER, *Circuit Judge*, concurring:

I concur with the majority that the overtime provisions of the Fair Labor Standards Act (FLSA) permit the Secretary of Labor to extend coverage to some "executive," "administrative," and "professional" employees performing the work of strikers who themselves would be covered by the Act. The district court at this point in the case properly enjoined future violations of the FLSA by Western Union and created a framework for payments of amounts owed to employees for work during the 1971 strike.

This court has not decided that all such managerial employees are non-exempt from the Act. In addition to the calculations of how much back pay is due, the district court must now also decide the still open question of precisely which employees are covered by the overtime provisions. That issue will involve a careful review of the applicable regulations.

I believe the district court might possibly be misled by the majority's statement that the Secretary is within his discretion in using the "workweek" in determining the classification of employees. Although that standard might properly be applied to some managerial employees, it should not affect those exempted by the final provisos in the sections defining executive, administrative and professional personnel.[1]

First, the broader language of those provisos is ill-fitted to definition on a week-to-week basis. The court

[1] 29 C.F.R. §§ 541.1-541.3 (1976). The current proviso pertaining to executives, id. § 541.1, is typical of the language of all three sections of the regulations:

> *Provided*: That an employee who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which he is employed . . . shall be deemed to meet all of the requirements of this section.

need not accept an interpretation by the Secretary which is plainly inconsistent with the regulations. See *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945). Second, to classify highly paid employees on the basis of work performed during a given time-frame rather than on the basis of primary duties would compound the difficulty of reconciling the Secretary's interpretation of the regulations with the statutory exemption in the FLSA of those employed in a "bona fide executive, administrative, or professional capacity," 29 U.S.C. § 213 (1970).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2014 and 2015

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

vs.

WESTERN UNION TELEGRAPH CO.,

Peter J. Brennan, etc., Appellant in No. 76-2014

Western Union Telegraph Co., Appellant in No. 76-2015

(D.C. Civil Action No. 771-73)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge*, ALDISERT and HUNTER, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 31, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 4, 1976, be and the same is hereby reversed as to appeal No. 76-2014 and affirmed as

to appeal No. 76-2015, all in accordance with the opinion of this Court. Costs are taxed against Western Union Telegraph Co.

ATTEST:

/s/

Chief Deputy Clerk

August 12, 1977

APPENDIX E

Section 7(a)(1) of the Fair Labor Standards Act (29 U.S.C. § 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce for any workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Section 13(a) of the Fair Labor Standards Act (29 U.S.C. § 213(a) provides in pertinent part:

> The provision of section 206 and 207 of this title shall not apply with respect to—
>
> (a) any employee employed in a bona fide executive, administrative, or professional capacity (as such terms are defined and delimited from time to time by regulations of the Secretary . . .).

Department of Labor Regulation (29 C.F.R.) provide in pertinent part (bracketed salary figures are those which were in the regulations at the time of the strike):

> § 541.1 Executive.
>
> The term "employee employed in a bona fide executive * * * capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and

> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent . . . of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section.
>
> (f) Who is compensated for his services on a salary basis as a rate of not less than $155 [100] per week . . . exclusive of board, lodging, or other facilities:
>
> *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 [150] per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.
>
> § 541.2 Administrative.
>
> The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of . . .:
>
> (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers . . .; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assist[s] a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent . . . of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 [100] per week . . . exclusive of board, lodging, or other facilities . . .:

Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 [150] per week exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

§ 541.3 Professional.

The term "employee employed in a bona fide * * * professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(a) whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advanced type in a field of science or learning customarily

acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectural ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee . . .; and

(b) whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $170 [$115] per week . . . exclusive of board, lodging, or other facilities.

. . .

Provided further, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 [150] per week exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a)(1) or (3) of this section, which includes work requiring the consistent exercise of discretion

and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a–27a) is reported at 561 F. 2d 477. The opinion of the district court (Pet. App. 1a–8a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a–29a) was entered on August 12, 1977. The petition for a writ of certiorari was filed on November 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether employees who normally perform executive, administrative or professional work are exempt

from the overtime and maximum hours provisions of the Fair Labor Standards Act when performing rank-and-file work during a lengthy strike.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.* (FLSA), by failing to pay overtime compensation at one and one-half times the regular rate of pay to its "white collar" employees who performed "blue collar" work during a prolonged strike by two unions. The parties stipulated that the employees in question are normally excluded as executive, administrative, and professional employees from the Act's overtime provisions by Section 13(a)(1), 29 U.S.C. 213(a)(1). The parties also stipulated that the work involved here, when performed by rank-and-file employees, is covered by the overtime provisions (A. 38–44).[1]

During the strike, which ~~listed~~ lasted from June 1, 1971, to September 12, 1971, petitioner closed its public message service but kept operating some government services, the Telex-TWX systems used by private businesses, and the Mailgram service (A. 34–43). Approximately 2,000 white collar employees kept these services functioning; they performed principally service and maintenance functions on the various communications systems (A. 34, 38, 39, 41, 43). They worked more than 40 hours per week during the strike, but petitioner paid them only their normal salaries (A. 43).

[1] "A." refers to the appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

ministrative employees, but it granted summary judgment for the Secretary and enjoined petitioner from violating the Act with respect to professional and administrative employees, but it granted summary judgment for petitioner with respect to "executive" employees (Pet. App. 9a–11a).[2] On cross-appeals, the court of appeals held that professional, administrative, and executive employees alike lost their exemption while performing nonexempt work during the strike (Pet. App. 24a and n. 10). The court of appeals reasoned that the Act required assessment of each employee's duties during each week of work; consequently, it concluded, an employee could be an exempt managerial employee one week and a covered employee the next, depending on the character of the work he was performing.

ARGUMENT

The court of appeals' holding that managerial employees are not exempt from the overtime and maximum hours limits of the FLSA when they are assigned to replace strikers in the performance of covered work for a prolonged period is correct. It presents no issue requiring review by this Court.

[2] The district court saw a limited regulatory distinction between executives on the one hand, and professional and administrative employees on the other. Petitioner abandoned this distinction in the court of appeals and does not rely on it here.

1. It was stipulated that petitioner's managerial employees were assigned "to perform the clerical, technical, operational, and maintenance functions" normally performed by the strikers (A. 36).[3] It was also stipulated that a "substantial number" of them "devoted substantially more than 50% of their time" to such tasks and that "[those] tasks if they had been performed by the striking employees would have been non-exempt work" (A. 44).

Because the Act provides that its coverage depends on the nature of the work being performed by each employee, it follows that the employees at issue here should have been given overtime pay while performing the struck work. The exemption goes no further than its purpose, and nothing in the Act supports petitioner's argument that an employee who is generally

[3] "Managerial" employees are those "who, apart from the strike context, usually qualify for exemption from the maximum hours provisions because they function 'in a bona fide executive, administrative or professional capacity.'" Pet. App. 17a. Under Section 13(a)(1) of the Act, "executive, administrative, or professional" employees are exempt if they qualify as such under regulations of the Secretary. See 29 C.F.R. 541.1, 541.2, and 541.3. The regulations provide that employees are ineligible for exemption if they devote more than 20 percent of the "hours of work in the workweek" to non-exempt activities. 29 C.F.R. 541.1(e), 541.2(d), and 541.3(d). Employees who devote more than 20 percent of their time to covered work in any week still may be exempt if certain salary and other tests are met and the "primary duty" of the employee is "management" (in the case of executives; *id.* at 541.1(a)), or of "office or nonmanual work directly related to management policies or general business operations" (in the case of administrative employees; *id.* at 541.2(a)), or of work "requiring knowledge of an advanced type in a field of science or learning" or work that is "original and creative in character in a recognized field or artistic endeavor" (in the case of professional employees; *id.* at 541.3(a)).

engaged in managerial work retains his exemption even when he forswears managerial work and begins to do something else.

The fact that petitioner continued to pay the strike replacements their usual salaries (Pet. 7) does not affect the outcome. The Act does not set any upper limit to the salaries of those who are subject to the Act's overtime requirements. A "blue collar" worker is covered by the Act even if he is paid $50 per hour or $1,000 per week; the Act is not limited to the penurious worker. The overtime rules compensate an employee in a specific manner for the strain of working longer than forty hours per week (*Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446, 470; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423–424; *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40, 42). The employees here were required to work long hours over an extended period, performing tasks admittedly within the contemplation of the overtime provisions. The "specific manner" prescribed by the statute (*Bay Ridge, supra*, 334 U.S. at 470) of compensating for such hours is time and a half (29 U.S.C. 207(a)(1)). Nothing in the statute or its legislative history supports petitioner's suggestion that the overtime premium is not applicable if the normal salary is higher than the minimum wage (Pet. 6)[4] or the rate

[4] Petitioner suggests (Pet. 5–6) that the Act applies only to nonunionized workers, not to workers who can "protect themselves" by joining a union or by belonging to management. No case has limited the protections of the Act to employees who cannot organize for their own protection, and the Act, on its face, allows no such distinction.

paid to rank-and-file employees for the same work (Pet. 7).[5]

An employee may gain and lose exemption depending on the nature of his work. The Act's compensation standards are based on the "workweek"; the minimum hourly rate must be paid to "each of [the] employees who in any workweek is engaged in commerce * * *." 29 U.S.C. 206(a). The overtime premium likewise must be paid to any employee engaged in commerce "in any workweek." 29 U.S.C. 207(a)(1).

Section 13(a)(1), which creates the managerial exemption, embodies the workweek as the basic unit of scrutiny; in providing for the special case of retail store managers, it extends the exemption to those whose nonmanagerial work is "less than 40 per centum of [their] hours worked in the workweek * * *." 29 U.S.C. 213(a)(1).[6] An employee thus may be an

[5] The Secretary's regulations take salary levels into account by providing that no employee may qualify for the managerial exemption unless he receives a certain minimum salary. 29 C.F.R. 541.1(f), 541.2(e), and 541.3(e). But compliance with the salary test alone is not sufficient to make an employee exempt; the employee also must be doing managerial work. *George Lawley & Son* v. *South*, 140 F.2d 439, 444 (C.A. 1), certiorari denied, 322 U.S. 746; *Helliwell* v. *Haberman*, 140 F.2d 833, 834 (C.A. 2); *Usery* v. *Associated Drugs, Inc.*, 538 F.2d 1191, 1194 (C.A. 5).

[6] See also the repeated application of the "workweek" standard in numerous variations and qualifications of the compensation requirements throughout the Act; *e.g.*, 29 U.S.C. (and Supp. V) 206(b), 206(f) (1) and (2), 207(a)(2), 207(e)(5), (6), and (7), 207(f), 207(g), 207(i), 207(*l*), 207(m)(2), 213(b)(7), 213(b)(8) (A) and (B), 213(b) (18), (19), (23), (25), and 213(h)(2).

exempt manager one week and a covered worker the next.[7]

In sum, nothing in the statute or the regulations freezes an employee's exempt status. The Secretary's construction of the statute and of his implementing regulations should be respected. Exemptions from the wage standards of the Act are to be construed narrowly and are to be allowed only on a showing by the employer that the case is "plainly and unmistakably within [the] * * * terms and spirit" of the exemption claimed. *Phillips Co.* v. *Walling*, 324 U.S. 490, 497; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. Petitioner made no such showing here, and the Secretary's position therefore falls "well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers." *National Labor Relations Board* v. *Enterprise Association*, 429 U.S. 507, 528.

2. *McReynolds* v. *Pocahontas Corp.*, 192 F. 2d 301 (C.A. 4), which petitioner cites as conflicting with the present case (Pet. 4–5), decided that certain mine section foremen were "executives" within the meaning

[7] Courts consistently have used the workweek as the basis for application of the Act's compensation standards even where the Act does not explicitly use the term. Thus, to comply with the Act's standards, wages must be sufficient in each workweek; it is no defense that the average pay over longer periods is adequate, or that higher pay in one workweek makes up for deficiencies in another. See *Gatlin* v. *Mitchell*, 287 F. 2d 76, 79 (C.A. 5); *Roland Electric* v. *Black*, 163 F. 2d 417, 420–421 (C.A. 4), certiorari denied, 333 U.S. 854; *Dunlop* v. *New Jersey*, 522 F. 2d 504, 510–511 (C.A. 3), vacated on other grounds *sub nom. New Jersey* v. *Usery*, 427 U.S. 909.

of the exemption. The court rejected in passing the argument that one foreman who did manual work during a strike thereby lost his exempt status. The court cited only *Mafizola* v. *Hardy-Burlinhame Mining Co.*, 306 Ky. 492, 497–498, 207 S.W. 2d 769, 771–772, which itself stated the proposition without substantial analysis.

In our view, *McReynolds* was wrongly decided. But the apparent conflict among the circuits does not require review at the present time. *McReynolds* was decided in 1951; the Fourth Circuit might well reach a contrary conclusion if the question were presented today, given the development of the controlling legal principles during the last 27 years. If the Fourth Circuit should adhere to its position after additional consideration, there would be time enough for review by this Court.

3. There is nothing to petitioner's argument (Pet. 8–11) that the decision below contravenes the policy of the National Labor Relations Act by imposing a burden on employers that desire to wage economic war against their employees. It is far from clear that a court would be entitled to make FLSA give way because it impeded achievement of some other statutory goal; different enactments at different times often reflect different emphases concerning the importance of different goals. The National Labor Relations Act, for example, permits unfettered collective bargaining concerning wages, yet the FLSA sets a minimum wage that interdicts bargaining for some lower wage. Both statutes must be obeyed, and the employer cannot be relieved of the requirements

of one because of asserted policy implications underlying the other. The fact that an employer may demand blue-collar work from its white-collar employees in no way frees the employer from complying with its statutory wage obligations covering blue-collar work.

However that may be, there is no conflict in policy here.[8] The FLSA does not "disarm" (Pet. 8) employers from using managerial employees to stay in business during a strike. It provides only that the employers must pay their employees at a rate that takes into account their hours of work and the nature of the work they actually perform during the strike. The employers cannot demand 60 hours' work for 40 hours' pay. The application of the FLSA to managerial employees may increase the employer's wage costs, but, as the court of appeals properly concluded (Pet. App. 22a):

---

[8] We see no common ground between this decision on the one hand and *American Broadcasting Companies, Inc.* v. *Writers Guild of America, West, Inc.*, and its companion cases, Nos. 76–1121, 76–1153 and 76–1162, argued December 5, 1977, ordered set for reargument December 12, 1977, on the other. *Writers Guild* presents the question whether a union may lawfully discipline its members who cross picket lines to perform only their supervisory duties during a strike. To resolve that question the Court must decide whether union discipline under the circumstances is a restraint of the employer's selection of bargaining and grievance adjustment representatives in violation of Section 8(b)(1)(B) of the National Labor Relations Act, 61 Stat. 141, 29 U.S.C. 158(b)(1)(B). The answer to that question, whatever it might be, does not implicate the Fair Labor Standards Act, which concerns obligations of an employer. *Florida Power and Light Co.* v. *International Brotherhood of Electrical Workers*, 417 U.S. 790, held that unions may lawfully discipline member-supervisors for doing what the management employees did here.

> We would require stronger evidence of Congressional intent before we concluded that the policies of the FLSA may not be put into effect because, in cases where an employer cannot readily find replacements for its striking rank and file employees, these policies happen to have an effect on the economic weapons the employers may bring to bear against its striking employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

RAY MARSHALL, SECRETARY OF LABOR, *Respondent.*

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the largest association of business and professional organizations in the United States and is the principal spokesman for the American business community. The Chamber of Commerce has a direct membership of more than 3700 state and local chambers of commerce and professional and trade associations, and over 65,000 business firms.

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[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42.

The Chamber participated as an *amicus curiae* in the proceedings below before both the district court and the court of appeals. In addition, the Chamber has frequently participated as amicus curiae in a wide range of significant labor relations matters before this Court. *E.g., Connell Construction Co.* v. *Plumbers, Local 11,* 421 U.S. 616 (1975); *William E. Arnold Co.* v. *Carpenters,* 417 U.S. 12 (1974); *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974).

The interest of the Chamber and its members in the instant case results from the necessity of maintaining a balanced national labor policy. The resolution of the paramount issue in this case, whether the overtime compensation requirement of the Fair Labor Standards Act is applicable to normally exempt managerial and supervisory personnel who replace striking workers, is of vital significance to the Chamber and its members.

The holding of the court below, that management employees must be paid one-and-one-half (1-½) times their management salary, places a substantial economic burden on strike-bound employers, severely restricting or eliminating the ability of those employers to continue operations during the strike. The net result of the holding is to upset the delicate balance which exists in labor-management relations and therefore interfere with the free flow of commerce. Accordingly, the decision below interferes with the right of Chamber members to exercise their right to free collective bargaining guaranteed by the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

For the first time in the thirty-nine (39) year history of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.,* the Department of Labor has sought in this case to impose the overtime provisions of that Act, 29 U.S.C. § 213(a), on normally exempt, management personnel who temporarily replace striking workers.[2] A substantial federal question is presented by virtue of this interpretation's direct conflict with the policy of free collective bargaining, without governmental interference, guaranteed by the National Labor Relations Act. 29 U.S.C. § 141 *et seq.*

The judicial extension of the overtime compensation requirement to supervisory and management personnel, despite contrary judicial precedent[3] and legislative history,[4] drastically alters the balance of the collective bargaining process so carefully crafted by Congress[5] and severely restricts the ability of management to counter and respond to the economic pressure which may be applied by a union during a labor dispute. If permitted to stand, the decision of the Court of Appeals will result "in a significant shift in the balance of free economic bargaining power struck by Congress." *International Association of Machinists and Aerospace Workers, et al.* v. *Wis-*

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[2] The *amicus* relies on the Petitioner's statement of the case and hereby accepts and adopts the arguments set forth in the petition for writ of certiorari.

[3] *McReynolds* v. *Pocahontas Corp.,* 192 F.2d 301 (4th Cir., 1951); *Mafizola* v. *Hardy-Burlington Mining Co.,* 306 Ky. 492, 207 S.W.2d 769 (1947).

[4] *See, e.g.,* S. Rep. No. 884, 74th Cong., 1st Session, 5 (1937).

[5] *See, e.g., Teamsters* v. *Morton,* 377 U.S. 252, 260 (1964).

consin Employment Relations Commission, 427 U.S. 132, 156 (1976) (Powell, J. concurring) (hereinafter *Machinists* v. *Wisconsin*).

Further, because of the large number of labor disputes occurring nationwide every year, the holding will have an immediate and significant impact on the national economy.[6] Accordingly, the case is particularly appropriate for review by this Court.

The National Labor Relations Act (NLRA) establishes a system of free collective bargaining which requires good faith in bargaining but "leaves the adjustment of industrial relations to the free play of economic forces and seeks to assure that the play of those forces be truly free." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 183 (1941). This policy forbids governmental "intrusion into the substantive aspects of the bargaining process" and requires that the government not "regulate what economic weapons a party might summon to its aid." *NLRB* v. *Insurance Agents' Union,* 361 U.S. 477, 490 (1960). It is precisely this sort of governmental intrusion into the bargaining process that the Secretary of Labor has sought here. Clearly, the holding below is in direct conflict with the congressional intent "to allow the balance of bargaining advantage to be set by economic power realities." *NLRB* v. *Burns,* 406 U.S. 272, 288 (1971). *Accord, Machinists* v. *Wisconsin, supra,* at

[6] Work stoppages are not isolated occurrences. For example, between the years 1969 and 1973, there was an average of two thousand two hundred one (2,201) work stoppages per year which exceeded fifteen (15) days in length. Bureau of Labor Statistics, *Handbook of Labor Statistics 1975—Reference Edition,* pp. 394-95 (1975).

147; *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970); *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959); Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401, 1409 (1958).

Collective bargaining is, in this context, after all, a test of the economic strengths of management and labor. *See, e.g., NLRB* v. *Insurance Agents' Union, supra,* at 489; *H. K. Porter Co.* v. *NLRB, supra.* In this test of economic strength both management and labor may resort to the use of economic weapons in attempts to obtain what they are unable to secure through peaceful bargaining. *Machinists* v. *Wisconsin, supra,* at 147. One of the most successful and visible forms of such pressure available to a union is the strike. Related and permissible methods of self-help available to employees include informational picketing, 29 U.S.C. 158 (b)(7)(C), and a refusal to work overtime, *Machinists* v. *Wisconsin, supra.*

Employers may also resort to the use of economic weapons in response to the activities of their employees. *Machinists* v. *Wisconsin, supra,* 147-53. Methods available to an employer in such an economic struggle include the lockout, *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1976), the hiring of permanent replacements, *NLRB* v. *MacKay Radio and Television Co.,* 304 U.S. 333 (1938), and the use of management and supervisory personnel to replace striking workers. *See NLRB* v. *Brown,* 380 U.S. 278, 281 (1965).

The use of management and supervisory personnel in place of striking workers is a legitimate and recognized response to a strike by an employer who is attempting to continue operation. It has, therefore, been

applied in labor disputes in a wide range of industries, including broadcast,[7] communications,[8] chemical[9] and petroleum.[10] *See, e.g.,* J. Robinson and R. Walker, *Labor Economics and Labor Relations* 369 (1973); J. Hutchinson, *Management Under Strike Conditions* 124-25 (1966); A. Rees, *The Economics of Trade Unions* 37 (1962).

The decision below, by requiring that management replacements be paid one-and-one-half (1-½) times their management salaries, will greatly increase an employer's cost of operating during a strike. It will, therefore, virtually eliminate use of this management tool. By impairing the effectiveness of this weapon, the overtime requirement will alter the calculation by both management and unions with respect to what demands management could feasibly resist and those to which as a matter of practical economics it would have to accede. *See generally* Cox, *Labor Law Pre-emption Revisited,* 85 Harv. L. Rev. 1337, 1353 (1972).

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[7] NABET Members at ABC Wonder What They Won, *Broadcasting,* October 10, 1977 at 76; Coe & Holt, Radio & TV Unionism in Focus, *Broadcasting and Bargaining: Labor Relations in Radio & TV,* 38 (A. Koenig ed. 1970); At CBS the Show Goes On, *Business Week,* April 12, 1958 at 132-33.

[8] Wires Keep Humming in Phone Walkout, *Business Week,* April 27, 1968 at 102-03; Phone Supervisors Answer the Call, *Business Week,* Nov. 20, 1971 at 21-22; *New York Times,* Nov. 5, 1961 at 29, Col. 1.

[9] Strikes: What Softened the Punch?, *Chemical Week,* Oct. 5, 1963, 41-43.

[10] E. B. Shils, *Automation and Industrial Relations,* 175-76 (1963).

Two important factors must be considered when making these calculations. The first is the ability of a particular company to withstand the threat of a complete shutdown of its operations, and the second is the fact that many management and supervisory personnel are paid substantially higher salaries than those of the workers they are replacing. Consequently, the company must balance the possible loss of revenue from a shutdown with the cost of continued operation. The substantial increase in the cost of continued operations mandated by this decision will clearly affect the employer's ability to counter a strike. In this situation the employer is placed in the untenable position of being forced to submit to the strikers' demands, attempt to find skilled replacements, or pay prohibitively higher wages to the managerial employees. The result is that "one party to an economic contest [is denied] a weapon that Congress meant him to have available." Lesnick, *Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon,* 72 Col. L. Rev. 469, 478 (1972), quoted in *Machinists* v. *Wisconsin, supra,* at 150.

Governmental intrusions of this nature, whether they act directly or indirectly upon the collective bargaining process, constitute an impermissible interference with the balanced labor policy created by the NLRA. The impact of this intrusion is analogous to the imbalance in collective bargaining created by a state's award of unemployment benefits to striking employees, while assessing their employers for contributions to support such benefits to the strikers.

In enjoining such an award by the State of Hawaii, the court stated:

> It was unquestionably the intent of Congress that collective bargaining, free from state interference, should be the foundation of the federal labor policy. (Citations omitted.)
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> In the absence of any [express] Congressional approval, it can only be said that Hawaii's statute impermissibly intrudes into the area of labor law fully occupied by the NLRA.

Hawaiian Telephone Co. v. *State of Hawaii Department of Industrial and Labor Relations,* 405 F. Supp. 275, 290 (1976). The imposition of such assessments is indistinguishable from the economic burden upon strike-bound employees that the court below has imposed.

Congress has recognized in the National Labor Relations Act that collective bargaining unfettered by government intrusion is necessary to the free flow of commerce. 29 U.S.C. 141, 151 (1973). And this Court has recognized that "the presence of economic weapons in reserve and their actual exercise on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB* v. *Insurance Agents' Union, supra,* 361 U.S. at 489. To restrict either the objectives for which economic pressure can be applied or the forms of pressure which are permissible tips the scale toward management or unions. Cox, *Labor Law Pre-emption Revisited, supra.* The action of the Secretary in the instant case severely tips the balance in favor of unions. We submit that only the Congress has the authority to upset the balance it established in the NLRA. *See* Cox, *Labor Law Pre-emption Revisited, supra,* at 1354.

CONCLUSION

For the reasons noted above, the petition for writ of certiorari should be granted.

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